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Torts

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ceivable need not be used in business transacted outside of Ohio to be exempt. The court did not undertake to reassess the validity of its earlier holding. Both decisions, however, are difficult to reconcile with the wording of Section 5709.02, Ohio Revised Code (Section 5328-1, Ohio General Code) which excludes from taxation intangible property of " persons residing in this state used in and arising out of business transacted outside of this state. "[51]

In the sole case involving the corporate franchise tax,[52] the court held that under applicable statutes[53] the Tax Commissioner must accept as final the taxpayer's reported book value of assets if its books are kept in accordance with sound and generally recognized accounting principles. The Commissioner need not accept the book value of assets reflected in the taxpayer's books, however, if there is evidence tending to prove that the accounts have been falsified, " or that the asset values shown therein are not in fact what they purport to be." Presumably, the Commissioner need not accept the book values either if "sound and generally recognized" accounting principles are not used. Thus the Commissioner has some weapons to show the valuation is wrong, but the burden is on him. The majority's interpretation of the Code sections may be justified by practical necessities, but it comes close to the dissenters' position that the Commissioner is required " to accept as final whatever figure the taxpayer may choose to offer."[54]

FRANKLIN C. LATCHAM

TORTS

Negligence

Special Relationships

a. Sellers

Whether wrong or wronged, used car dealers have often borne the brunt of various supposed jokes. Now the Supreme Court of Ohio has cast a

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[51] Under the tax on intangible property see also Reinhard v. Peck, 159 Ohio St. 116, 111 N.E.2d 262 (1953) which held a sale by an executrix of securities belonging to the estate was in the usual course of business of the executrix within Section 5711.01, Ohio Revised Code (Section 5366, Ohio General Code) and was therefore not taxable.

[52] National Tube Co. v. Peck, 159 Ohio St. 98, 111 N.E.2d 11 (1953)

[53] OHIO REV. CODE §§ 5733.02, 5733.03, 5733.05 (OHIO GEN. CODE §§ 5495-2, 5496, 5497, 5498).

[54] Dutt v. Marion Air Conditioning Sales, 159 Ohio St. 290, 112 N.E.2d 32 (1953) involved the state's lien for unpaid unemployment compensation tax. Under Section 4141.23, Ohio Revised Code (Section 1345-4(a)(4), Ohio General Code) the state has a lien on all real and personal property of the delinquent taxpayer. When the state files a notice of lien in the office of the county recorder where the property is located it was held the state has a prior lien to all mortgages filed thereafter.

more serious eye on the situation and ruled that a used car dealer may be held liable for injuries resulting from his sale of a defective used vehicle. The case is *Thrash v. U-Drive-It Co.*[1] Defendant used car dealer represented to Ronald Thrash's father that a certain truck was in good operating condition. But, in fact, presumably without the dealer's knowledge, the truck was equipped with a misfitted and insecure lock ring on the left front wheel. Ronald's father purchased and used the truck in his business, where it was being used when the mishap occurred. The defective lock ring blew off, causing the tire also to come off. The truck crushed Ronald, a passenger, as it rolled down an embankment. Ronald sued the dealer for his injuries, mainly on the ground that the dealer had failed to make a proper inspection of the truck before sale. In the trial court, a verdict was instructed for the dealer before any evidence was allowed. The supreme court upheld the court of appeals reversal for new trial, by saying: "Although a dealer in used motor vehicles is not an insurer of the safety of the vehicles he sells, he is generally under a duty to exercise reasonable care in making an examination thereof to discover defects therein which would make them dangerous to users or to those who might come in contact with them."[2] The court emphasized the significance of any accompanying representations by the dealer of the vehicle's fitness for use.

Perhaps of more general application was the court's refusal to extend liability to the U-Drive-It Co. which had sold the car to the dealer "as is." Counsel for plaintiff apparently pressed the famous *MacPherson v. Buick Motor Co.* case,[3] but the court found no parallel in reason for an extension of that case to these circumstances, " especially where he [seller to used car dealer] makes no representations or warranties as to the condition of the vehicles sold" and " had no dealings with plaintiff's father"[4] and where plaintiff's father had not relied on him in making the purchase.[5]

b. Landowners

In *Lampe v. Magoulakis,*[6] defendant hired an independent contractor to paint a storeroom and persuaded him to use two of defendant's ladders for the job. One of the ladders broke down in normal use, injuring plaintiff, an employee of the contractor. The plaintiff received a verdict for his

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[1] 158 Ohio St. 465, 110 N.E.2d 419 (1953).

[2] *Id.* at 422, 110 N.E.2d at 423.

[3] 217 N.Y. 382, 111 N.E. 1050 (1916). Justice Cardoza there expressed the opinion of the court that manufacturers who negligently distribute defective automobiles may be liable to ultimate purchasers who are injured as a result.

[4] Thrash v. U-Drive-It Co., 158 Ohio St. 465, 471, 110 N.E.2d 419, 422 (1953)

[5] Imposing possible liability on the used car dealer was, of course, merely an extension of the *Buick* case.

[6] 159 Ohio St. 72, 111 N.E.2d 7 (1953), *motion for rehearing denied.*

injuries approved without opinion by the court of appeals but reversed by the Supreme Court of Ohio. The latter court classified the plaintiff's position as that of a licensee on the basis that the ladders were gratuitiously lent to the contractor. The loan had no connection with the contractual relationship of the parties. Thus defendant had no duty to inspect the ladders before making the loan.[7]

In *Denison v. Buckeye Parking Corp.*,[8] the owner of a parking lot was relieved of liability for injuries incident to a defective driveway abutting the lot, even though the defects were the consequence of repeated use of the driveway by persons going to and from the lot. In *Wise v. Great Atlantic & Pacific Tea Co.*,[9] the owner of a store parking lot was held not responsible for the dangerous condition created by the natural accumulation of ice and snow in the lot. Finally, it was held in *Hay v. Norwalk Lodge No. 730, B.P.O.E.*[10] that a landowner may be liable if a limb from his tree falls on a highway traveler if the landowner should have been aware of the danger.[11]

c. Landlords

A landlord is not liable in tort for injuries resulting from defects in any premises under the exclusive control of his tenants, even if the landlord contracted to make all necessary repairs. In *Pitts v. Cincinnati Metropolitan Housing Authority*[12] a right reserved by the landlord to enter his tenant's premises when necessary to provide sufficient services did not take exclusive control of the premises from the tenant, according to the Ohio Supreme Court. In *Bowman v. Goldsmith Bros. Co.*,[13] a lower court was confronted with a stairway which led down to a basement apartment, up to second floor apartments and from there led only to plaintiff's premises. Held: The plaintiff could not recover from the landlord for the plaintiff's injuries in falling on accumulations of ice and snow on the upper portion of the stairway, even if the landloard had agreed to keep the stairway clear.

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[7] In *Wellman v. East Ohio Gas Co.*, 160 Ohio St. 103, 113 N.E.2d 629 (1953), it was held that a landowner is not responsible to an employee of an independent contractor engaged on the landowner's premises for injuries arising out of the job from a hazard known by the independent contractor: in this case from the high pressure of trapped gas in pipes which the contractor was installing on the premises.

[8] 94 Ohio App. 379, 115 N.E.2d 187 (1953)

[9] 94 Ohio App. 320, 115 N.E.2d 33 (1952)

[10] 92 Ohio App. 14, 109 N.E.2d 481 (1951)

[11] In *Niebes v. Crestline Aerie No. 859, Fraternal Order of Eagles*, 94 Ohio App. 21, 114 N.E.2d 260 (1952), a fraternal organization was held to owe no greater duty to members of its ladies auxiliary, gratuitously using the premises, than it owed to any gratuitous licensees. Involved was a defective stairway and a tumble for a member of the auxiliary.

[12] 160 Ohio St. 129, 113 N.E.2d 869 (1953), *motion for rehearing denied.*

[13] 63 Ohio L. Abs. 428, 109 N.E.2d 556 (App. 1952)

With one judge dissenting, the court felt that the upper portion of the stairway was in plaintiff's exclusive control.[14]

d. Common Carriers

In *Franck v. Railway Exp. Agency, Inc.*,[15] the plaintiff had shipped some healthy horses via the defendant express company. They were received at their destination in an allegedly damaged condition. The lower court instructed the usual presumption of negligence on the part of the carrier. The supreme court remanded for a new trial on the ground that the plaintiff had sent his own agent along with the shipment. Therefore, said the court, the plaintiff was in just as good a position as the defendant to know the reason for the damages and did not need the benefit of a presumption. Other shippers also lost the benefit of presumptions of negligence against carriers, one because the deterioration of livestock was held to be due to their natural propensities;[16] the other because damage to shipped goods was discovered by the consignee after he had transported the consigned goods from the carrier to his own place of business.[17]

e. Host Drivers

Ohio Appellate Courts continued to wrestle with the now established standard for wanton misconduct under the guest statute: "a disposition to perversity." In *Fessel v. Schwartz*[18] the court did not believe that the defendant driver had such a disposition at the time of the claimed injury, even though he may have shown it earlier in failing to make proper stops at intersections. In *Miljak v. Boyle*,[19] the court held that a mere disposition to perversity is not enough without actual injury-causing conduct demonstrating such a disposition. The plaintiff had proven only a peevish disregard by the defendant driver of a request by the occupants of the car for the defendant to exercise more caution.

In *Hartman v. Wooley*,[20] the question whether plaintiff was a guest within the terms of the guest statute was held to be one for the jury where plaintiff only paid for the gas. The question was whether there was "a

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[14] A less debatable ground for the opinion might have been that a landlord is not responsible for injuries arising out of natural accumulations of ice and snow. For a recent opinion on this point, see Ross v. Heberling, 92 Ohio L. Abs. 148, 109 N.E.2d 586 (App. 1952).

[15] 159 Ohio St. 343, 112 N.E.2d 381 (1953).

[16] Trees v. Penn. R.R., 91 Ohio L. Abs. 497, 109 N.E.2d 29 (App. 1951).

[17] Elder & Johnston Co. v. Commercial Motor Freight, Inc., 94 Ohio App. 358, 115 N.E.2d 179 (1953).

[18] 94 Ohio App. 201, 114 N.E.2d 730 (1952).

[19] 112 N.E.2d 340 (Ohio App. 1952).

[20] 115 N.E.2d 714 (Ohio App. 1951).

substantial tangible benefit conferred" upon the defendant driver as payment for the transportation.[21]

Evidence

In *Hamilton v Cleveland,*[22] a company rule prohibiting bus drivers from holding extended conversation with passengers was admitted as evidence of defendant's negligence. The plaintiff was injured by the concussion from the discharge of a policeman's pistol during a friendly conversation between defendant's bus driver and the policeman aboard a bus. One can at least wonder whether the company powers were thinking of any hazards but those of the road when they framed the admitted rule.

Contributory Negligence

Of several cases involving suits against Cincinnati for injuries arising from defective streets or sidewalks, one at least seems worthy of mention. In *Friedman v. Cincinnati,*[23] the plaintiff walking to work on a sidewalk abutting an allegedly heavily traveled street came to a broken slanting sidewalk. Instead of changing the hazards of the street or taking an alternate roundabout means he continued on. He fell and injured himself. Assumption of risk may be the holding, but the court noted that this is often called contributory negligence. Take your choice.[24]

Assured Clear Distance Ahead

Two interesting fact situations are little more than cited. One involves a plaintiff who in broad daylight ran into the shovel of a large caterpillar ditcher extended over a highway.[25] The appellate court held that the question of plaintiff's due care was one for the jury. The other case involved a plaintiff who on a foggy night allegedly swerved to avoid an animal in the road and ran into defendant's trailer.[26] The trailer was claimed to be parked on the road unlighted and unguarded. The court held as a matter of law for the defendant.

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[21] Interesting from an analytical point of view is *Melville v. Greyhound Corp.,* 94 Ohio App. 258, 115 N.E.2d 42 (1953) Plaintiff sued one defendant under the guest statute for wanton misconduct together with another defendant for ordinary negligence. The latter defendant claimed that he could not possibly have been the proximate cause of plaintiff's injury where the other contributing party was guilty of wilful misconduct. The court held that such conduct was foreseeable and also that concurring wrongdoers may be joined in one action. For an affirmance of the latter principle, see Glass v. McCullough Transfer Co., 159 Ohio St. 505, 115 N.E.2d 78 (1953).

[22] 93 Ohio App. 93, 110 N.E.2d 50 (1952)

[23] 92 Ohio App. 160, 109 N.E.2d 520 (1952)

[24] See also Griffin v. Cincinnati, 92 Ohio App. 492, 111 N.E.2d 31 (1952)

Res Ipsa Loquitur

In *Kruper v. Proctor & Gamble*,[27] the plaintiff purchased from a retailer a bar of soap in the original package of defendant manufacturer. The plaintiff was injured by a piece of wire imbedded in the soap. The court of appeals held that from these facts the jury might find that the defendant had had exclusive possession and control of the soap during manufacture and that defendant had been negligent. Liberties with "exclusive control" were also taken by another appellate court in *Hudson v. Bennett*.[28] The defendant owned and operated a motor vehicle auction lot containing autos consigned to him for sale. It was defendant's practice to park cars in the lot, in gear, brakes applied and the key in ignition. During a sale attended by many prospective customers, one of the parked and driverless cars rolled down a slanting driveway leading from the lot into the street where it collided with plaintiff's auto. It seems that prospective purchasers were allowed to start the motors of the various cars and even to drive them. Held: res ipsa loquitur applies. Obviously somebody was negligent, said the court, and if it were a customer, such action was apparently contemplated and should have been prevented by defendant. Besides, the plaintiff could in no way explain or "determine the specific cause of the collision."[29]

False Imprisonment

In *Lester v. Albers Super Markets, Inc.*,[30] the plaintiff had gone into the defendant's store to purchase a can of fruit cocktail while waiting for a streetcar. While standing in line to complete her purchase, she saw her streetcar approaching; so she put down the fruit cocktail on the nearest counter and prepared to leave. Her way was immediately blocked by a clerk who expressed a desire to search her shopping bag. She resisted by word, he persisted by word. She acquiesced, although no force nor threats of force were used. The practice in this store was to check all bags for

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[25] Schultz v. Meyerholtz, 91 Ohio App. 566, 109 N.E.2d 35 (1951). See also note, 5 WEST. RES. L. REV. 77 (1953).

[26] Bredenbeck v. Hollywood Cartage Co., Inc., 92 Ohio App. 265, 110 N.E.2d 152 (1952).

[27] 113 N.E.2d 605 (Ohio App. 1953). The supreme court reversed in January of this year: 160 Ohio St. 489 (1954). For a full analysis see a later issue of this review.

[28] 94 Ohio App. 329, 115 N.E.2d 20 (1952).

[29] See also Sieling v. Mahrer, 113 N.E.2d 373 (Ohio App. 1953), where res ipsa loquitur was held not applicable in aid of specific charges of negligence. But the charges involved medical diagnosis and treatment ordinarily excluded from the scope of the doctrine. See Motorists Mut. Ins. Co. v. Calland, 93 Ohio App. 543, 114 N.E.2d 162 (1952), where res ipsa loquitur was applied in a suit involving an automobile collision.

[30] 94 Ohio App. 313, 114 N.E.2d 529 (1952).

concealed goods belonging to the store. The plaintiff was an old customer. Held: judgment for the plaintiff reversed and judgment entered for the defendant. Such submission to mere verbal directions was not a false imprisonment, for there was no restraint against the will of the plaintiff, said the court. Who can doubt, upon reflection, that the plaintiff must have felt some restraint, but the court planted its decision in firmer soil by adding that a customer who "apparently" has not paid for what he has received may be detained for a reasonable period for the purpose of investigation.

Slander

According to the decision in *DeAngelo v. W.T Grant Co.*,[31] a department store manager may accuse an employee, in this case a sales girl, of shortages in her account within the hearing of a passing employee without liability for slander. The accusations were held qualifiedly privileged because arising in the course of the employer-employee relationship. Furthermore, the statement was made in direct answer to a question put by the accused employee.

Fraud

In *Gusman v. Peter*,[32] it was decided that a representation by an Ohio vendor of a restaurant to an out of state buyer that a beer and wine license was readily obtainable for a restaurant located in Ohio was not a statement of opinion, but of fact. Thus the buyer might properly sue for fraud where such statement was not true.[33]

Release

In *Mainfort v. Giannestras*,[34] it was held that a release by an injured party to a physician who negligently caused the injury might serve to bar a suit by the injured party against another physician who negligently aggravated the original injury. It would depend, said the court, whether the first physician might be liable for the aggravation under the doctrine of proximate cause.[35]

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[31] 64 Ohio L. Abs. 366, 111 N.E.2d 773 (App. 1952).

[32] 113 N.E.2d 371 (Ohio App. 1953).

[33] See also Waters v. Novak, 115 N.E.2d 420 (Ohio App. 1953), where the court points out the distinction between implied malice and the actual malice necessary to justify the recovery of exemplary damages in a suit for fraud.

[34] 44 Ohio Op. 440, 111 N.E.2d 692 (Hamilton Com. Pl. 1950).

[35] Under this doctrine, where the negligence of a third person enters in, the party responsible for the original negligence is also responsible for the subsequent negligence if it is what is usually termed as "forseeable."

[36] 158 Ohio St. 375, 109 N.E.2d 855 (1952), *motion for rehearing denied.* See CIVIL PROCEDURE in this issue and also 5 WEST. RES. L. REV. 109 (1953).